IN THE

Supreme Court of the United States

October Term, 1963

No.

JAMES W. RALPH,

vs.

HARRY ZUBIK COMPANY, INC.,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. VINCENT BURKE, JR., ESQUIRE.
1100 Peoples Bank Building,
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and

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Attorneys for Petitioner.

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No.

JAMES W. RALPH,

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HARRY ZUBIK COMPANY, INC.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Harry Zubik Company, Inc., prays that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Western District of Pennsylvania.

Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit, a copy of which is hereto annexed, Appendix A, page 8, as the same has not yet been reported in any volume of the Federal Reporter.

The Opinion of the United States District Court for the Western District of Pennsylvania is reported in 214 Federal Supplement 145 and also in the printed Record of the Court below; a certified copy of said Record is attached to the within Petition.

Basis of Jurisdiction

The judgment sought to be reviewed herein is that of the United States Court of Appeals for the Third Circuit signed July 31, 1963 and entered on the same day.

The jurisdiction of your Honorable Court is invoked pursuant to the provisions of Title 28 U. S. Code, Section 1254 (1) and the Supreme Court Rules 19 1. (b) in that the District Court has so far departed from the accepted and usual course of judicial proceedings and the Court of Appeals has sanctioned such a departure as to call for an exercise of this Honorable Court's power of supervision.

Questions Presented for Review

I. Was the petitioner denied due process in being deprived of a fair trial by the District Court's arbitrary refusal to permit introduction of impeachment evidence, and did it so far depart from the accepted and usual course of judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

II. Was the petitioner denied due process in being deprived of a fair trial by the District Court's one-sided and warped charge to the jury which was in conflict with the decisions of your Honorable Court and did it so far depart from the accepted and usual course of the judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

Provisions of Law Involved

The Constitutional provisions and statutes and rules which this case involves are all set forth in the appendix hereto, in the order set forth herein, and are as follows: United States Constitution, Amendment V; United States District Court for the Western District of Pennsylvania, Pre-Trial Rule 5 (II) G.

Statement of The Case

James W. Ralph, a seaman, brought suit in the District Court for the Western District of Pennsylvania under Section 33 of the Merchant Marine Act of 1920 as amended, 46 U.S.C.A. 688 (commonly referred to as the Jones Act), for alleged injuries sustained while working as a deckhand on the motor vessel "Prosperity" operated by Harry Zubik Company, Inc., the petitioner herein.

At the trial on June 19, 1962, in the District Court before a jury and the Honorable Louis Rosenberg, D.J. presiding, Ralph testified he was injured when operating a capstan on the M. V. "Prosperity" and the cog on the capstan did not hold and he was struck on the arm by the capstan handle.

Ralph testified he was able to see the worn teeth on the capstan where the cog was supposed to fit in.

Petitioner, Harry Zubik Company, Inc., the defendant in the within action, attempted to attack the credibility of the seaman, James W. Ralph, by showing that the teeth are enclosed in a solid cast iron shell and it was physically impossible for Ralph to see the teeth of the capstan.

As part of its defense in impeaching the seaman, Ralph, the petitioner, Harry Zubik Company, Inc., attempted to produce in court the capstan in question, to submit the M

V. "Prosperity" for a view by the jury, a scale drawing of the capstan, and the testimony of the president of the company that manufactured the capstan, but said offers were refused by the trial judge because such witnesses and evidence were not listed in the Pre-Trial Statement or at the Pre-Trial Conference. The Pre-Trial regulations of the District Court, Appendix B, page 9, specifically exclude impeachment evidence. Defendant's Pre-Trial Statement and the proceedings of the Pre-Trial Conference are listed in the Appendix for the use of the Court below, 9 (a) to 16 (a).

The District Court charged the jury in such a manner that was entirely one-sided and biased and over the objections of your petitioner.

The jury rendered a verdict in favor of the seaman Ralph in the amount of $22,000 against your petitioner and motions for new trial were refused by the District Court and the judgment affirmed by the United States Court of Appeals in a *Per Curiam* Opinion stating it perceived no substantial error in the proceedings.

ARGUMENT AND REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I

Was the petitioner denied due process in being deprived of a fair trial by the District Court's arbitrary refusal to permit introduction of impeachment evidence, and did it so far depart from the accepted and usual course of judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

Petitioner was not permitted to introduce impeachment evidence because the District Court stated that such evi

dence was not listed in the narrative Pre-Trial Statement or at the Pre-Trial Conference as required by the District Court's Pre-Trial Rules.

The Pre-Trial Rules of the United States District Court for the Western District of Pennsylvania states Rule 5 (H)(6) as follows:

> "6. Failure to make a full disclosure of the evidence during the Pretrial Conference will result in the exclusion of that evidence at that trial. The only exceptions will be (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) impeaching matter and (3) privileged matter. Insofar as the impeaching or privileged matter is known at the time of the pretrial it must be disclosed to the court alone, for determination by the court as to the requirement of disclosure."

It is readily ascertained from the reading of this Rule that impeaching matter is an exception to the disclosure at the pretrial conference and said impeaching matter offered by the petitioner was not ascertainable at the time of the Pre-Trial Conference and was admissible and the District Court's refusal was prejudicial and deprived petitioner of a fair trial.

District of Columbia vs. Chessin, 61 Federal Second 523 holds that testimony offered by either party tending to contradict testimony given by the other related to such matter under consideration is admissible.

Plaintiff, seaman Ralph, stated on direct examination that he examined the capstan in question and was able to see the worn gears. Petitioner, Harry Zulik, Company, Inc., attempted to introduce evidence that such examination was physically impossible because the gears were encased in a solid cast iron shell, but this defense was denied your petitioner because of the District Court's erroneous interpretation of its own Pre Trial Regulations.

It is submitted that rules of court may not abrogate or modify substantive law and the exclusion of such evidence deprived petitioner of a fair trial to which he is entitled.

Such departure from the usual course of judicial proceedings calls for the exercise of your Honorable Court's power of supervision.

POINT II

Was the petitioner denied due process in being deprived of a fair trial by the District Court's one-sided and warped charge to the jury which was in conflict with the decisions of your Honorable Court and did it so far depart from the accepted and usual course of the judicial proceedings that calls for the exercise of your Honorable Court's power of supervision?

The District Court, in its charge to the jury, consumed:

1. 12 pages of testimony on the discussion of the law;

2. 10 pages of testimony on the plaintiff's testimony and damages;

3. 16 lines with reference to the defendant's denials and the defendant's allegations;

4. Nothing about the defendant's testimony.

This one-sided and warped charge was prejudicial to the petitioner and deprived him of a fair trial and is in conflict with Sperber vs. Connecticut Mutual Life Insurance Company, 190 Federal Reporter 2nd, page 2, certiorari denied 321 U.S. 798:

> "While a federal trial court is not at all required to state his recollection of the evidence with nice exactitude for both sides, yet if such summary is made

it must be fair to both sides to the extent that it is not so one-sided and so warped that it must be regarded as prejudicial to one side in its effect upon the jury.

Summary of Reasons for Granting this Writ

It is apparent that petitioner was denied due process in the defense of the litigation and the decision ought to be reviewed in order to correct an error of law and the arbitrary administration of justice in depriving petitioner of its rights, and it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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and,

MARTIN E. GEARY, ESQUIRE,
921 Jones Law Building,
Pittsburgh, Pa. 15219,

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,348

JAMES W. RALPH,
v.
HARRY ZUBIK COMPANY, INC.,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 21, 1963

Before Biggs, Chief Judge, and Staley, Circuit Judge, and Steel, District Judge.

Opinion of The Court

(Filed July 31, 1963)

Per Curiam.

We have examined carefully the record in this case and have considered the arguments of the parties. We perceive no substantial error in the proceedings. Accordingly, the judgment appealed from will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

CONSTITUTION OF UNITED STATES

AMENDMENT V

Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PRE TRIAL REGULATIONS

United States District Court for the Western District of Pennsylvania; Pre-Trial Rule 5 (D) (6):

"(6). Failure to make a full disclosure of the evidence during the Pretrial Conference will result in the exclusion of that evidence at that trial. The only exceptions will be: (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) impeaching matter and (3) privileged matter. Insofar as the impeaching or privileged matter is known at the time of the pretrial it must be disclosed to the court alone, for determination by the court as to the requirement of disclosure.

Certificate of Service

I certify that I have served five copies of the foregoing Petition with Lloyd Engle, Jr., Esquire, attorney for the plaintiff, personally.

.....

Attorney for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1963

No. 462

JAMES W. RALPH,

Respondent,

vs.

HARRY ZUBIK COMPANY, INC.,

Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HARRY ZUBIK COMPANY, INC.,

Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, James W. Ralph, opposes the Petition for Writ of Certiorari and herein presents arguments in opposition.

Counter Statement of Questions Presented for Review.

I. Was the petitioner denied due process by the District Court's refusal to permit the introduction of certain evidence which was offered for the purpose of attacking credibility, which evidence was available to and known by petitioner but not raised in the Pre-Trial Procedure?

II. Was the petitioner denied due process by the District Court's charge to the jury which reviewed the evidence and presented it in practical conformity with the manner in which it had been heard by the jury?

Counter Statement of the Case.

The statement of the case presented by petitioner is accepted with the following supplements and additions.

At the trial in the District Court, James W. Ralph testified that the captain of the vessel suddenly backed the vessel without warning while he was operating a capstan on the M. V. Prosperity, thereby causing the line around the capstan to tighten suddenly and the cog on the capstan did not hold, whereupon the capstan handle flew back and struck him on the arm.

Ralph testified that, after he was injured, he examined the teeth on the cog of the capstan (Appendix for the use of the Circuit Court of Appeals, 27a and 41a). Counsel for petitioner sought to offer drawings, apparati and testimony of persons which were not listed by petitioner in the Pre-Trial Procedure, obstensibly to attack the credibility of Ralph concerning whether or not it was possible to *see* the teeth of the cog on the capstan.

The District Court charged the jury in a completely unbiased manner and fairly covered the law and the evidence in much the same manner as the jury had heard the testimony.

The jury rendered a verdict in favor of James W. Ralph in the amount of $22,000, wherein the jury specifically found that the vessel was seaworthy but that the captain

had been negligent. The motion for new trial presented on behalf of petitioner was refused by the District Court and the judgment was affirmed by the United States Court of Appeals.

ARGUMENT AND REASONS WHY THE WRIT SHOULD BE REFUSED.

POINT I

Was the petitioner denied due process by the District Court's refusal to permit the introduction of certain evidence which was offered for the purpose of attacking credibility, which evidence was available to and known by petitioner but not raised in the Pre-Trial Procedure?

During the trial, Seaman Ralph testified as to the method of operating the capstan which he was working at the time of the injury. He also testified that the capstan was defective in that the "teeth" in the mechanism were worn (Appendix for the use of the Circuit Court of Appeals, 27a and 41a). Petitioner sought to call as a witness Mr. Howard Kirchner, President of the American Machine and Engineering Company, to testify with respect to the construction and operation of the capstan and also sought to have the entire vessel or the capstan produced as an exhibit. Mr. Kirchner was not listed as a witness by petitioner nor were the vessel and capstan listed as exhibits in the Pre-Trial Procedure. Petitioner had notice that the operation of the capstan would be an issue since the respondent stated in the Pre-Trial Procedure that "the cog on the capstan slipped" (Appendix for the use of the Circuit Court of Appeals, 7a) when the captain backed the

vessel without warning, causing the handle of the capstan to strike Seaman Ralph's arm.

As a matter of fact, petitioner did have an effective witness in Harry Zubik, President of the petitioner, who had about thirty years' experience on river boats (Appendix for the use of the Circuit Court of Appeals, 165a). Mr. Zubik testified fully on the construction and operation of the capstan (Appendix for the use of the Circuit Court of Appeals, 169a to 179a).

The petitioner was not denied any right by the refusal of the District Court to permit the introduction of evidence and testimony which was merely repetitive of the testimony adduced through the witness Zubik, particularly where the excluded testimony and evidence were not properly raised in the Pre-Trial Procedure and, if admitted, would have come as a complete surprise to respondent, who would have been afforded no opportunity to proceed with discovery in order to determine the competency and veracity thereof. The offer was properly rejected by the District Court in accordance with local Rule 5 II (G), which states:

> "(G. Failure to make a full disclosure of the evidence during the Pretrial Conference will result in the exclusion of that evidence at that trial. The only exceptions will be (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) impeaching matter and (3) privileged matter. Insofar as the impeaching or privileged matter is known at the time of the pretrial it must be disclosed to the court alone, for determination by the court as to the requirement of disclosure."

At any rate, this particular matter is purely academic, since the jury specifically found that the vessel was seaworthy and apparently rejected Ralph's testimony as to

possible defects in the capstan. The recorded basis for the jury's verdict was the negligence of the captain of the vessel.

In *Ambrose v. Norfolk Dredging Company*, 284 F. 2nd 802 (C. A. 4, 1960), the Court upheld, on the ground of harmless error, the refusal to permit a seaman in a personal injury action to testify as to a doctor's statement in order to rebut a charge of malingering, where defendant was found not liable. In the same sense here, even if the exclusion by the District Court were in error, it was not prejudicial to petitioner in any way, since the jury found the vessel seaworthy. The offered testimony and evidence, as to the construction and operation of the capstan, could have achieved no more effective result on the issue of seaworthiness.

POINT II

Was the petitioner denied due process by the District Court's charge to the jury which reviewed the evidence and presented it in practical conformity with the manner in which it had been heard by the jury?

Petitioner improperly considers the District Court's refusal of the testimony on a quantitative rather than qualitative basis. It should be emphasized that petitioner presented only one witness, so that the testimony adduced on its behalf was far less than that of respondent and consisted primarily of pure denials. The same kind of allegation of unfairness was rejected in *Jamison v. Hawkins*, 13 Pa. Superior Ct. 372, 375 (1900), where the Court said that the testimony of the plaintiff was "a little more fully stated, because the facts relating to the case were therein detailed at greater length for the reason that the burden of making out a case rested upon the plaintiff."

As a matter of fact, the District Court made considerably more reference to the petitioner's contentions than the petitioner has stated to your Honorable Court. These specific references are to be found on Pages 217a and 226a of the Appendix for the use of the Circuit Court of Appeals.

It is equally important to note that the petitioner has improperly emphasized the treatment which the District Court gave to the respondent's evidence in stating that the District Court devoted ten pages to such evidence. The only particular references to the contentions of respondent comprises approximately one page set forth on portions of Pages 225a and 226a of the Appendix for the use of the Circuit Court of Appeals.

A review of the entire charge of the District Court is convincing as to its fairness in submitting the issues and facts to the jury. It is also important to consider that the District Court admonished the jury that it need not accept its review of the facts as conclusive (Appendix for the use of the Circuit Court of Appeals, 227a) and reiterated this admonition to the jury after petitioner's exceptions to the charge (Appendix for the use of the Circuit Court of Appeals, 242a).

Conclusion.

The trial of this action was conducted by the District Court in a most fair and impartial manner, particularly in view of the repeated efforts of counsel for petitioner to depart from established procedures as prescribed by the local Rules. Clearly, the District Court and the Circuit Court of Appeals gave exhaustive consideration to the points and arguments raised before your Honorable Court, as well as many other arguments which were raised by petitioner and are now apparently abandoned. In the sound

exercise of judicial discretion, the District Court and the Circuit Court of Appeals have not deemed it proper to disturb this judgment in any manner. The petitioner has not been denied any right which would have been available to the petitioner on the basis of the procedure which it chose to follow, and respondent respectfully submits that the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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Attorneys for Respondent.

Certificate of Service.

I certify that I have served five copies of the foregoing brief on Martin E. Geary, attorney for the petitioner, personally.

LLOYD F. ENGLE, JR.,
Attorney for Respondent.